Supreme Court of the United States

October Term, 1938.

FEDERAL TRADE COMMISSION,
Petitioner,
against
THE AMERICAN TOBACCO COMPANY,
Respondent.

No. 23

SUPPLEMENTAL BRIEF FOR RESPONDENT.

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INDEX.

Inaccuracies in the Statement of the Case in the Commission's brief—

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It is not our purpose in this reply to reargue the evidence, but, as the brief for the Federal Trade Commission contains in its Statement of the Case certain inaccuracies as to the facts, we think the Court's attention should be called to them. For example, on page 5 it is stated:

I.

> "The Commission * * * entered an order on February 16, 1924, against the wholesalers and against the American Tobacco Company, requiring them and each of them to Cease and Desist from the use of the method of competition alleged in the complaint and set out in the Findings (Rec., p. 723)."

The method of competition alleged in the Complaint is a conspiracy to maintain fixed prices between the

Wholesale Tobacco & Cigar Dealers' Association of Philadelphia, its officers, directors and certain dealers who were members of the Association, and are referred to in the complaint as the members; and The American Tobacco Company and P. Lorillard Company, who are called Respondent Manufacturers.

The complaint alleges that "Respondent Manufacturers **cooperated and conspired with the Association and its members,"** (Rec., 5, fol. 13) to maintain such prices. The Cease and Desist Order against The American Tobacco Company restrained it from **assisting and agreeing** to assist any of **its dealer-customers** in maintaining and enforcing, etc. (Rec., 725, fol. 1361). The statement therefore that The American Tobacco Company was required to cease and desist from the use of the method of competition alleged in the complaint is clearly erroneous.

The Order not only does not conform to the allegations of the complaint but enjoins something less than the conspiracy with which the complaint charges respondent, less indeed than any unlawful conduct or unfair methods of competition. It enjoins giving assistance. The Order is impossible of enforcement, requiring as it does The American Tobacco Company to

> "cease and desist from assisting * * * any of its dealer-customers in maintaining and enforcing in the resale of cigarettes and tobacco products manufactured by the said The American Tobacco Company, resale prices for such cigarettes and other tobacco products, fixed by any such dealer-customer by agreement, understanding or combination with any other dealer-customer of said The American Tobacco Company."

It is shown in the Record and admitted (Commission's brief 8) that tobacco products are sold at certain discounts off list prices and that the jobbers use the

manufacturers' lists, with or without discount, in sales to retailers. Undoubtedly every manufacturer who issues a list with a discount from the list may be taken as suggesting to his jobber customers that they sell at the list and retain the discount—in the tobacco business 10% —to cover their cost of operation and profit. Suppose that two of The American Tobacco Company's dealer-customers, without the knowledge of The American Tobacco Company should agree to observe The American Tobacco Company's list prices, then The American Tobacco Company would have violated the Order. This Order places the Respondent at the mercy of each, any and all of its dealer-customers. An agreement between any two of them to observe Respondent's price list would render the Respondent liable to the penalties of violation of the Order.

II.

On pages 8 and 9, the brief for the Commission states:

> "Accordingly, negotiations were entered into by the Association with The American Tobacco Company for the purpose of securing the assistance of that Company in the Association's activities regarding price fixing. The Association sought and secured the cooperation of The American Tobacco Company in such persuasion and intimidation (Rec., pp. 430-431)."

We submit that there is no evidence of any "negotiations" and the statement that the Association "sought and secured the cooperation of The American Tobacco Company" is entirely unsupported.

The testimony in the record at the place referred to (pp. 430-431) is the transcript of a verbal sparring match between the Commission's attorney and the late Percival S. Hill, then President of The American Tobacco Company. The attorney being somewhat more adroit than

Mr. Hill, led him to say that if a price condition was satisfactory to The American Tobacco Company it was satisfactory to the jobbers. This perhaps is what is referred to in the Commission's brief.

Quite obviously this was not what Mr. Hill meant, and he testified on cross examination as follows:

> "Q. Mr. Hill, in response to a question on redirect examination, you said, of course, to my recollection, that if the profit of jobbers in a given community was satisfactory to the American Tobacco Company, it was satisfactory to the jobber. Did you mean that? A. Well, I meant—yes, I meant it in this way: A price that is satisfactory to the American Tobacco Company is a price that permits the people who are distributing our goods to make a living, and if the people that are distributing our goods are making a living, it is satisfactory—the conditions are satisfactory to them.
>
> "Q. Well, is it always satisfactory to the jobber? A. He always wants——
>
> "Q. By merely making a living? A. He wants to make more, of course.
>
> "Q. Well, then, you do not say that if the price was satisfactory to the American Tobacco Company, it is necessarily satisfactory to the jobbers, do you? A. No, not to be technical. Of course, I do not suppose it is exactly that.
>
> "Q. What you meant to say, Mr. Hill, was if the price was one that the jobbers were satisfied with, and their facilities were unimpaired, it was satisfactory to the American Tobacco Company? A. *I apologize for my bad use of the English language*" (Rec., 441, fol. 799).

Mr. Hill further testified (Rec., 429):

> "Q. Mr. Hill, you have said in answer to the direct examination of Mr. Smith that Mr. Eberbach undoubtedly visited you in 1921 and that you had no reason to deny that Mr. Krull* visited you.

*Three men were officers of the Philadelphia Association.

Did you say to either of these gentlemen or both together that The American Tobacco Company would support or cooperate with or farther the activities of their Association? A. No, sir.

"Q. In any way? A. Not at all."

This part of Mr. Hill's testimony is not referred to.

III.

It is then stated (Commission's brief 9)

> "Names of offending dealers were furnished to the American Tobacco Company requesting its assistance in the enforcement of its system of price fixing and the American Tobacco Company upon receiving such information proceeded to investigate, and upon finding that an offending dealer was cutting prices, refused to furnish the dealer with further supplies" (Rec., p. 383, Com. Exhibit 16, Rec., p. 232).

Rec., p. 383 is the testimony of O'Boyle who was asked if he was told the reason why direct shipment of goods to a Philadelphia jobber named Seider was discontinued. He answered that he thought he was told unofficially

> "I think it was because—I understood at the time, I think, he was selling merchants in Philadelphia at less than the price in effect here by this group of jobbers."

This sort of supposition and surmise is hardly the basis for a positive statement much less a finding.

Commission's Exhibit 16, referred to in the extract from the Commission's Brief just quoted is what is called the Sales Department Work Sheet of The American Tobacco Company, dated September 7, 1921. It gives in the list of "Accounts added to our List of Direct Customers" three concerns and under the designation "Ac-

counts Discontinued on our List of Direct Customers", there are fourteen names. It is interesting to observe their geographical distribution and the reasons given for their discontinuance:

Bertig Bros., Paragould, Ark. (Retailers.)
S. Z. Joseph Merc. Co., Paragould, Ark. (Retailers.)
Robt. McLane Co., Cameron, Texas (credit reasons); also branch at Caldwell, Texas.
Kelly Bros. Co., Fernandina, Fla. (Inactive)
Capital City Gro. Co., Tallahassee, Fla. (Credit reasons.)
R. W. Davis & Co., Atlanta, Ga. (inactive)
Oglesby Bros., Atlanta, Ga. (No cooperation.)
Murphy Bros., Camden, N. J. (Sales reasons.)
Bernstein & Kursman, Inc., Bridgeport, Conn. (Sales reasons.)
Armstrong Gro. Co., Okeechalee, Fla. (closed out); branch at Dayton, Fla.
J. S. Penkussohn Cig. Co., Jacksonville, Fla. (closed out); branch at Savannah, Ga.
American Grocers Society, Inc., Pittsburgh, Pa. (Sales reasons.)
Nathan Rosenblum, Sharon, Pa. (No cooperation.)
Sher & Sinograd, Milwaukee, Wis. (Sales reasons.)

Sales Department.

"No cooperation" obviously means that the dealer named did not try energetically to sell the respondent's brands.

The fact that names appear on this list of dealers, some of them separated by a thousand miles, is no evidence that the account of any of them was discontinued at the instance of the Philadelphia Association. It could as well be argued, that the American Grocers Society of Pittsburgh or Oglesby Bros. of Atlanta, Georgia (both of whom appear on it) were placed on the discontinued list on account of the intimidation and coercion of the

Philadelphia Association, as that Murphy Bros. were placed on it for that reason.

IV.

The statement is then made in the Commission's brief (p. 9)

> "During the period of fixed prices, as set out hereinbefore, The American Tobacco Company issued circular letters to its wholesalers, which in effect signified that that Company would cooperate in the maintenance of prices fixed by its jobbers in any given territory. This letter was also a veiled threat that the company would refuse to continue selling to any of its customers who would sell at prices less than those fixed by a majority of its customers in any given territory. (Rec., p. 672)."

This record reference is to Commission's Exhibit 10.

To appreciate how signally this letter fails to sustain the statement made concerning it, we quote it in full:

> Circular No. 2783
> The American Tobacco Company, Incorporated.
> 111 Fifth Avenue, New York, June 29, 1921.
> To our Jobbing Customers:
>
> It is of the highest interest to this company to maintain permanent means of distributing its brands of tobaccos and cigarettes by efficient and business like methods.
>
> We can only expect to obtain and hold customers when it is possible for jobbers to sell our products profitably.
>
> It is obvious that a jobber of our products who sells at prices which would not permit of the tobacco business itself being profitable, or the business on our brands being profitable taken by itself, is a jobber who in the long run will be a detriment and not a benefit to our business as our customer.
>
> Any jobber who sells our products without

profit or with such a small profit that it will not benefit him to continue permanently in the tobacco jobbing business on such a margin of profit is not a distributor who can afford us a safe and permanent avenue of distribution, and, if by his persistent price cutting he discourages and destroys the interest in our brands with competing jobbers we may eventually be left without adequate means of thorough distribution in his locality.

For this reason we are convinced that for the future of our business we are bound to prevent as far as we reasonably and lawfully may such demoralization in the trade so far as our products are concerned. This does not mean price maintenance but it does mean that where a jobber is not interested in making a fair and reasonable profit on our brands and elects to sell our products for motives of his own, at less than a living profit, we are forced to the conclusion that he is not sufficiently interested in our goods to make a desirable permanent customer and we shall feel at liberty to remove him from our list of direct customers.

We trust that this policy will have the approval of all customers who are concerned in making a livelihood out of the tobacco business.

Very respectfully,

The American Tobacco Company, Inc.,
George W. Hill, Vice President.

George W. Hill

It will be observed that this letter is dated June 29, 1921 and as the Philadelphia Association was organized in 1920 it certainly did not induce the organization of the Association.

V.

The Commission's Brief then resumes (p. 9), referring to this letter,

> "Of course, it applied to the Philadelphia and Camden territory."

It applied to the whole United States and represented the policy of the American Tobacco Company independently conceived and applicable everywhere.

VI.

On page 10, the Commission's brief states,

> "The American Tobacco Company knew of the Association's price agreements and expressly agreed with the Association to help its members to maintain those price agreements. (Rec., pp. 430-431.)"

The record reference is to the testimony of Mr. Hill, President of The American Tobacco Company, and depends upon what Mr. Hill meant by the word "satisfactory". Counsel fail to quote Mr. Hill's statement at Rec. 440 and the statement on the same page (Rec., 431).

> "Q. So continuing to be specific, did not you say to Mr. Eberbach and Mr. Krull, or to either of them, that you would assist them or cooperate with them in selling at a discount of not greater than 8 percent? A. I certainly did not."

VII.

The Commission's brief resumes (page 10).

> "The American Tobacco Company cut off from its direct list a price-cutting competitor of the members of the Association. This jobber, continuing to resell at prices in effect by him previous to the organization of the Association, and refusing to comply with the direction of The American Tobacco Company that he join (Rec. 315), was removed from the list of distributors of the Tobacco Company for the purpose of assisting the Association to maintain its price agreements (Rec. 383)."

This must have reference to the Seider incident but the record references which are given, do not sustain the statements in the brief. Record 315 is the deposition of Charles Seider who testified concerning an interview with O'Boyle,

> "A. So far as I can recall he spoke about the conditions that were existing at that time and asked whether we would not comply with the prices that were given out by the Association."
>
> "Q. Did you know these prices that had been adopted by the Association? A. Yes, sir.
>
> "Q. Do you know whether Mr. O'Boyle knew them? A. That I don't know.

Seider further testified (Rec. 331):

> "Q. Neither did the American Tobacco Company ever exact from you any promise or agreement as to what prices you would sell your goods? A. No.
>
> "Q. And never gave you any orders about selling your goods at any particular price? A. No.
>
> "Q. That is true? A. Yes."
>
> • • • • • • •
>
> "Q. Did O'Boyle say anything more at any time about the price at which you were selling your goods? A. No, sir. (Rec. 332)
>
> "Q. Did Mr. O'Boyle say anything to you about the prices at which you were selling your products? A. No.
>
> "Q. He said nothing? A. No." (This refers to a second conversation).

The testimony signally fails to justify the broad statement in the Commission's brief.

VIII.

The brief then states (p. 10):

> "The American Tobacco Company removed from its list of customers another of its price-cut-

> ting jobbers for the purpose of assisting the Association in maintaining its fixed prices (Commission's Exhibit 16, Rec., p. 232)."

Commission's Exhibit 16 is the Sales Department Work Sheet previously referred to. It contains the names of fourteen dealers scattered all over the country who were dropped for various reasons—credit, inactive, closed-out, sales reasons, and it is as rational to assume that Murphy Bros. whose name appears upon it were dropped at the behest of the Philadelphia Association as it is that Bernstein & Kursman of Bridgeport, Conn., were. The fact is that shipments to Murphy Bros. were temporarily discontinued on September 7, 1921 (Rec., 232) because they owed respondent as much as $35,000 (Rec., 424). They were restored to the list on October 4, 1921 (Rec., 223). Mr. Murphy however did not even know his firm had been dropped until informed of it during his testimony in this case (Rec., 264).

IX.

The brief then resumes (p. 10):

> "This jobber had been expelled from the Association for price-cutting (Rec., 237-239)."

The jobber referred to being obviously Murphy Bros.

This represents the extreme of uncandid inference. Mr. James Murphy testified (Rec., 236) that he withdrew from the Association about December, 1921 with his brother (Rec., 237). They were not expelled. Murphy stated (Rec., 242), that he had what he described as a "spat". He testified:

> "Q. And the spat lasted five or ten minutes?
> "A. Yes, sir. It didn't amount to anything and we all went out.
> "Q. Well, you resigned from the Association right there, didn't you?

"A. Yes, sir.

"Q. Did you tell Mr. Eberbach you were withdrawing from the Association?

"A. Yes, sir. I told them all—all that was there—that I was through with the Association."

This occurred after a dinner in the Bourse Building, Philadelphia (Rec., 238). The Murphys did not attend until late and did not go to the dinner. They did not go to the Bourse Building that evening for the purpose of attending the meeting of the Association.

"A. No. We were practically disgusted with the Association."

The witness testified (Rec., p. 240):

"Q. Did they say anything about the tobacco manufacturing companies?

"A. Not to my recollection.

"Q. Did they say anything about the American Tobacco Company?

"A. Not to my recollection • • •

"Q. Did they say anything about any of the salesmen of the American Tobacco Company?

"A. Not that I can remember."

It is interesting to note that Commission's Exhibit 16 is dated September 7, 1921, and announced the discontinuance of Murphy Bros. on the direct list of The American Tobacco Company (along with fourteen others) whereas Murphy Bros. were then members of the Philadelphia Jobbers Association and did not resign until December, 1921. So when direct shipments to them were discontinued on September 7, 1921, they were still members of the Association. They were restored to the direct list on October 4, 1921 (Rec., 223, Exhibit 21) while they were still members of the Association but when they got out of the Association in December, 1921, the American Tobacco Company kept right on selling them (Rec., 254).

Mr. Murphy testified that the longest delay that his firm experienced in getting goods was three weeks on a shipment from Louisville (Rec., 263) and that there were no unusual delays (Rec., 264).

X.

The Commission's brief states (p. 10):

> "In addition to the assistance furnished by the tobacco company to the Association in the latter's price-fixing scheme, it also cooperated by way of withholding shipments of goods to two members of the Association who were suspected of price cutting and who had been reported by officers of the Association to The American Tobacco Company as being suspected of having cut the Association's prices (Rec., 386-387)."

This relates apparently to Fermani and Blumenthal. O'Boyle was examined. Both Fermani and Blumenthal told him that their shipments were being held up. O'Boyle reported to The American Tobacco Company (Rec., 386). He testified:

> "Q. What was said to you by your superiors when you reported that Blumenthal said that his shipments were being held?
>
> "A. I think his shipments came forward immediately.
>
> "Q. Did you ever investigate or have anyone under you investigate the prices at which Fermani was selling or the discounts he was allowing?
>
> "A. No, sir.
>
> "Q. What do you say as to Blumenthal?
>
> "A. No, sir."

It will be observed that all of the testimony commented on in the foregoing pages is the testimony of witnesses called by the Commission and it seems to us

that these quotations demonstrate that there are no statements of fact in the Statement of the Case made by the Commission which are to any extent sustained by the testimony. It is not surprising then that the Circuit Court of Appeals held that the Commission's Order had no proof to support it.

XI.

We cannot refrain from mentioning the argument made on pages 50-51 of the Commission's brief:

> "There is, therefore, it is true a conflict in the testimony. The Commission found as a fact there was an agreement. This testimony (finding?) we have shown, is supported by competent proof—and the court below either ignoring the competent and legal proof of an agreement, or resolving the conflict in the testimony in favor of The American Tobacco Company found that there was no proof of an agreement. This we contend the court below had no right to do. The Statute provides:
>
> 'The findings of the Commission as to the facts, if supported by testimony shall be conclusive.'
>
> This finding therefore was conclusive upon the court below. It was the intention of Congress that the Commission should be the fact finding body and that the Circuit Court of Appeals should not interject its views of the facts where there is a conflict in the evidence."

We have quoted this argument rather fully so as fairly to present it.

The statement implies that there is testimony on the Commission's side and testimony on the respondent's side and raises the inference that the Commission weighed this conflicting testimony and found in its own favor and against The American Tobacco Company, that it had the right so to do and that its finding is conclusive and cannot be disturbed.

What is the so-called conflict in the evidence? There is no conflict. A conflict in the evidence occurs where one witness testifies to one thing and another witness testifies to another thing; when there are different versions of what happened and one or the other must be accepted.

"The conflict in the evidence" upon which the Commission's argument is based, on investigation proves to be an incident which occurred during the testimony of Mr. Hill, then President of The American Tobacco Company. He was called as a witness by the Commission. In the course of a protracted and argumentative examination by the Commission's counsel, Mr. Hill, not understanding a question, gave the answer quoted on pages 49 and 50 of the Commission's brief. When later his attention was called to the fact that his answer was ambiguous, he apologized for his "bad use of the English language" (Rec., 440) and then testified as quoted on page 50 of the Commission's brief (Rec., 441), expressly and explicitly stating that The American Tobacco Company never at any time made any agreements with any jobbers limiting their right to sell respondent's products for what they pleased, which is the truth as the Circuit Court of Appeals found.

Mr. Hill, in this so-called "conflict of testimony" said at an early part of his examination: "If it (meaning the price) is satisfactory to The American Tobacco Company, it is satisfactory to the jobber". Mr. Hill put his "if" in the wrong place; he meant "It (meaning the price) is satisfactory to The American Tobacco Company if it is satisfactory to the jobber", meaning thereby that if the jobber was satisfied with the profit he was making (using "jobber" in the collective sense) then The American Tobacco Company would be satisfied, because as long as the jobbers were satisfied with their profit, The American Tobacco Company would have an adequate number of distributors, and that is all it wanted. So long as the jobber was satisfied with his profit, the lower the price

the better The American Tobacco Company was pleased, as Mr. Hill testified (Rec., 418).

To say that there is a conflict in the testimony when a single witness who in direct examination misunderstands a question and makes an awkward answer, has his attention called to his mistake, apologizes for his bad English and corrects his answer, is a quaint conceit. That the Commission should base a finding on the mistake and ignore the correction seems incredible. But not only did it do so, it now contends that the Circuit Court of Appeals was without power to set the finding aside.

There is no conflict of testimony with respect to the agreement which the Commission charges between The American Tobacco Company and the Philadelphia Association. The testimony is all one way. Everyone who could know whether or not there was an agreement says that there was none. This is the uncontradicted and unimpeached testimony of the officers of The American Tobacco Company and of the Philadelphia Association.*

XII.

We do not know what counsel mean on page 50 by saying "the making of the agreement admitted by Mr. Hill on direct examination". We have said enough, we think, to show that this statement is a mistake.

XIII.

With the exception of the Commission's Complaint and Findings, the only thing in this record which we are able to find which mentions an agreement between The

* Mr. Hill (Rec., 429, 441). Answer (Rec., 11). Brugan—Secretary (Rec., 41, fol. 91, Rec., 50, fol. 109). Eberbach—President (Rec., 82, fol. 166, Rec., 99, fol. 196). Krull—Treasurer (Rec., 355, fol. 645), does not recall anything that Mr. Hill said (Rec., 363, fol. 658) certainly does not remember asking Mr. Hill for support (Rec., 363, fol. 658), was in Mr. Hill's office five minutes and does not recall a single thing that was said (Rec., 364, fol. 659). There was nothing more than a general discussion of trade conditions (Rec., 364, fol. 660). Krull never mentioned the interview to the Philadelphia Association (Rec., 369, fol. 669).

American Tobacco Company and the Philadelphia Association is the testimony of one Louis T. Cowie, an attorney and Examiner of the Federal Trade Commission. Cowie was sent to Philadelphia to investigate the jobbers association. He had no independent recollection of the events concerning which he testified (Rec., 148), but over objection he was allowed to read from a typewritten report made by him to the Commission. He dictated his report from notes not produced, three days after the occurrences purported to be stated in it (Rec., 136). The report was taken from the official files of the Commission on the day Cowie testified. He had not seen it in the meantime (Rec., 152).

Cowie was permitted to testify over objection what Harvey D. Narrigan, one of the Vice Presidents of the Philadelphia Association, told him that the representative of the tobacco manufacturers told Narrigan, for example (Rec., 141):

> "he (Narrigan) stated that the Jobbers Association had instructed Mr. Eberbach, its President, to call upon the American Tobacco Company and the Lorillard Company and request them to assist the Association in maintaining the prices or the account fixed by the Association. Mr. Eberbach did so and later reported to the Association that both of these Companies had agreed to do so."*

---

* Mr. Narrigan himself was interrogated and he said (Rec., 283, fol. 521):

Q. Now, this report you notice said you had told Mr. Cowie that the Jobbers' Association instructed Mr. Eberbach, its President, to call on The American Tobacco Company, and the Lorillard Company? A. I never understood any such thing. I didn't know of any such thing taking place.

Q. This report says Mr. Eberbach was to ask their officials—that is, The American Tobacco Company and P. Lorillard Company to assist in maintaining the discount fixed by the Association. Did you tell Mr. Cowie that? A. No, sir; positively not.

Q. Or that Mr. Eberbach went to those companies? A. Positively not.

Q. And that he later reported to the Association they had agreed to do so? Did you tell Mr. Cowie that? A. Positively not, sir.

Q. Do you know whether there was a committee of the Association ever appointed to call on the manufacturers? A. There was no committee of the Association or committee at all, appointed by the Association.

The Commission's finding and order in their language so closely follow Cowie's statement that they must have been based upon it (Rec., 776, fol. 75). For example one finding is (Rec., 777, fol. 76).

> "Said American Tobacco Company * * * agreed with the said Association and its members to help them maintain the price agreements * * *".

The language of the order (Rec., 780, fol. 82) is also strikingly like Cowie's report. The report from which Cowie read must have been filed with the Commission in September or October 1921 (Rec., 151, fol. 291) the findings which follow it so closely in language as well as substance were made February 16, 1924. Testimony was taken in the meantime, but apparently in this case the usual order of procedure was reversed and the findings of fact preceded instead of followed the evidence.

This situation confirms Mr. Justice Holmes' comment on the complaint in this case in *Federal Trade Commission* v. *American Tobacco Company*, 264 U. S. 298 307. "The investigations and complaints seem to have been only on hearsay or suspicion".

The testimony of its own investigator read from a written report to the Commission dictated after the pretended conversations, detailing what the investigator reported as statements made to him by another of what still another said is hearsay gone mad. While perhaps the Federal Trade Commission as an administrative body may relax the strict rules of evidence in its proceedings, still it is both complainant and Judge and to accept hearsay twice removed seems to transcend even what is reasonable in the case of a non-judicial fact finding body. To base findings upon such gossip is grotesque.

XIV.

It is argued on pages 42 and 43 of the Commission's brief that the American Tobacco Company signified its cooperation with the Association in a letter to a member of the firm of Murphy Bros. A part of that letter is quoted and the following argument is advanced.

> "It does not seem that one can escape the conclusion that this letter means cooperation."

We do not desire to extend this brief unduly but we think it our duty to the Court to facilitate an examination of the record for the purpose of getting at the truth. The incident referred to was a matter of routine business entirely unrelated to the allegations of the complaint and therefore can not raise the slightest suspicion in support of the Commission's assertions. A full explanation of this business transaction is in the record.*

Briefly, The American Tobacco Company "put on a deal" in connection with introducing a new brand called 111 Cigarettes—a familiar business expedient. By this deal the jobber was authorized to ship the retailer a quantity of Sweet Caporal Cigarettes free provided a 12-carton order included one carton of 111 Cigarettes. The circular which "put on" the deal provided that the jobber should report the gratis goods shipped by him to retailers and be reimbursed by credit memorandum. The provision for credit for gratis goods did not permit gratis to sub-jobbers. The jobbers claimed credit for gratis to dealers whom Mr. Bevill, the sales manager, knew as sub-jobbers, and he declined at first, therefore, to honor these reports from the jobbers. Their reply was that business was no longer done in Philadelphia through the instru-

* Trade Circular 2748. The American Tobacco Company's Exhibit 5 (Rec. p. 701). Bevill's testimony (Rec., 511, fol. 934 to 512 fol. 936, and 514 fol. 941 to 516 fol. 943, also 522 fol. 955)

mentality of sub-jobbers and all jobbers customers were treated as retailers. On the strength of this, after a visit to Philadelphia to investigate, Mr. Bevill reimbursed the jobbers. He sent the same form of letter to all the jobbers whom he reimbursed, not to Murphy Bros. only (Rec., 521, fol. 953). Surely it is not on such "evidence" that Commission's "findings" must be deemed conclusive by the Federal Courts?

XV.

The Commission argues:

> "II. The complaint and findings set out an unfair method of competition
>
> (A) Price fixing by agreement is an unfair method of competition
>
> (B) Price maintenance by combination or co-operation is an unfair method of competition."

The American Tobacco Company never fixed prices on its goods. What it objected to was their sale at prices so low as to impair its facilities of distribution. In Commission's Exhibit 10 (Rec., 672) it advised all of its jobbing customers: Jan. 29, 1921.

> "Any jobber who sells our products without profit or with such a small profit that it will not benefit him to continue permanently in the tobacco jobbing business on such a margin of profit is not a distributor who can afford us a safe and permanent avenue of distribution, and, if by his persistent price-cutting he discourages and destroys the interest in our brands with competing jobbers we may eventually be left without adequate means of thorough distribution in his locality.

> For this reason we are convinced that for the future of our business we are bound to prevent as far as we reasonably and lawfully may such demoralization in the trade so far as our products are concerned. **This does not mean price maintenance,** but it does mean that where a jobber is not interested in making a fair and reasonable profit on our brands and elects to sell our products, for motives of his own, at less than a living profit, we are forced to the conclusion that he is not sufficiently interested in our goods to make a desirable permanent customer and we shall feel at liberty to remove him from our list of direct customers."

and in Exhibit 33, May 2, 1921 (Rec., 682) it notified its customers:

> **"It is not our purpose here to establish the price at which our merchandise is sold;** that is a matter which rests entirely in the hands of our customers in any given community.
>
> We have no hesitation, however, in assuring you that where a customary price prevails in a given community, we are entirely within our legal rights in removing from our direct list of customers any customer who, by selling our merchandise at less than the prevailing price in that community, thereby destroys the interest of our customers as distributors of our product."

And in Commission's Exhibit No. 34 Nov. 5, 1921 (Rec., 683) Respondent said:

> In connection with your inquiry, we beg to state that **we here are not interested in nor do we cooperate with any association of jobbers or wholesale grocers whatsoever.** We are simply interested in the proper distribution of our brands by the legitimate distributor, and to this end we state that it is not our purpose to establish the price at which our merchandise is sold; that is matter which rests entirely in the hands of our customers in any given community."*

* The emphasis is ours and the quotations are parts of longer letters.

The circular letters containing the statements quoted were not sent to Philadelphia particularly, they were sent to respondent's jobbing customers throughout the United States either uninvited or in answer to inquiries.

The position of respondent as explained in these letters the Commission concedes is entirely lawful. There is, the Commission admits, nothing unlawful done or threatened by the respondent and no unfair method, but it asserts that because the lawful acts and fair methods happened to coincide with the interest of an alleged unlawful combination among its customers in Philadelphia, as well as to serve the interest of respondent both in Philadelphia and elsewhere, they become *ipso facto* unlawful — an unfair method of competition everywhere. This to us confused thinking.

For argument's sake, even supposing the combination and respondent's participation, it is a serious question, we think, whether lawful acts, not characterized by oppression, bad faith, fraud or deceit can be an unfair method of competition on the part of the actor even though performed in furtherance of a combination which may be unlawful. The test of unfairness is in the thing that is done. The Sherman Law provides a remedy for the unlawful combination, but Section 5 of the Federal Trade Commission Act, upon which this proceeding is founded, is directed solely at unfair methods of competition. It is only the unfairness of the method with which it is concerned. If the thing done is not unfair that ought, we think, to end the matter.

Respectfully submitted,

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